IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ROBERT O'NEAL DAVIS III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11391 Trial Court No. 3AN-05-5784 CI MEMORANDUM OPINION No. 6212 — July 22, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Andrew Guidi, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Coats, Senior Judge,[*] and Hanley, District Court Judge.[**]

Judge MANNHEIMER.

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

[**] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Robert O'Neal Davis III appeals the superior court's denial of his petition for post-conviction relief. Davis sought post-conviction relief based on the fact that (1) he did not testify at his trial, and (2) the judge who presided over Davis's trial failed to conduct a *LaVigne* inquiry before the judge allowed Davis's attorney to conclude the defense case.

(In *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991), our supreme court held that trial judges must not allow the defense case in a criminal trial to end until the defendant has either taken the stand or voluntarily waived the right to testify. When a defense attorney indicates that they intend to conclude the defense case, and the defendant has not taken the stand, a trial judge must address the defendant personally to make sure the defendant understands (1) that they have a right to testify, and (2) that the decision whether to testify is theirs alone, regardless of what the defense attorney thinks they should do.)

A trial judge's failure to conduct a *LaVigne* inquiry does not automatically require reversal of a defendant's criminal conviction. Rather, a defendant seeking reversal of a conviction based on a *LaVigne* error must show that they wanted to testify at their trial, and that they would have offered relevant testimony had they been allowed to testify. *Id.* at 221.

Based on the evidence presented in the post-conviction relief proceedings, the superior court found that Davis *initially* wanted to testify at his trial. The court further found that Davis's attorney informed him that he had a right to testify, but the defense attorney also told Davis that he was strongly opposed to Davis's taking the stand.

The superior court concluded, based on the evidence, that after Davis and his attorney discussed this matter several times, Davis ultimately decided to take his attorney's advice and not testify. Based on this finding that Davis ultimately did not

wish to testify, the court ruled that the *LaVigne* error was harmless beyond a reasonable doubt.

On appeal, Davis contends that the superior court's findings of fact are wrong — specifically, the finding that Davis ultimately decided not to testify. But an appellate court must uphold the factual findings of a trial court unless those findings are shown to be clearly erroneous. Under the "clearly erroneous" standard, the appellate court must affirm the lower court's finding of fact unless, after reviewing the entire record, the appellate court is left "with a definite and firm conviction that a mistake has been made, although there may be evidence to support the lower court's finding." *Booth v. State*, 251 P.3d 369, 373 (Alaska App. 2011). [1]

Given the record in Davis's case, we conclude that the superior court's findings of fact are not clearly erroneous. We therefore uphold those findings — and, as a consequence, we uphold the superior court's ruling that the *LaVigne* error in this case was harmless.

The judgement of the superior court is AFFIRMED.

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[1] Quoting *Geczy v. LaChappelle*, 636 P.2d 604, 606 n. 6 (Alaska 1981); *Mathis v. Meyeres*, 574 P.2d 447, 449 (Alaska 1978) (with slight alterations of the original text).